be able to compete via UNEs in all zones, because resale "provides a profit margin" even where "the costs of individual elements *exceed* the retail rate." *See Vermont 271 Order* ¶ 69 (emphasis added). AT&T and WorldCom have made no attempt here to demonstrate that the margins about which they complain are due to factors other than state subsidization of basic service. 101/

Contrary to AT&T's suggestion, *Sprint v. FCC*, 274 F.3d 549 (D.C. Cir. 2000), does not preclude the Commission from applying the foregoing principles. Indeed, the *Sprint* court expressly noted that tight margins might result from artificially low retail rates, and simply required the FCC to clarify its reasoning and to "help establish the reasonable range for interpretations of the statutory criterion." *Sprint*, 274 F.3d at 555. The Commission, as explained above, has done just that. 102/

In any event, the CLECs' attempts to demonstrate the existence of a price squeeze fail on both procedural and substantive grounds. As a procedural matter, because AT&T and WorldCom failed to present their new margin analyses to any state commission within Qwest's region, or to the multistate facilitator appointed by Idaho, Iowa, and North Dakota to review all such issues relevant to Qwest's 271 applications in those states, these analyses should not be considered. *See* Thompson Reply Decl. ¶ 121. As the Commission has previously stated, it is essential that parties to Section 271 proceedings first present all of their data and arguments to state commissions, given that "it is both impracticable and inappropriate for [the FCC] to make many [kinds of] fact-specific findings [in the context of a] section 271 review." *Vermont 271*

101/ Indeed, here state subsidization substantially limits the margin available to providers of local service. *See* Thompson Reply Decl. ¶ 142.

102/ Thus, the D.C. Circuit invited the Commission to assess whether the principles of *FPC v. Conway*, 426 U.S. 271 (1976), are applicable in this unique statutory context. The Commission did so, and determined that they are not, for a number of reasons. *Vermont 271 Order* ¶ 67. This conclusion is not barred by *Sprint*, which as noted above recognized the Commission's important role in interpreting the scope of the public interest standard of the Act.

Order ¶ 20. As a result of AT&T's "sandbagging," neither Qwest nor the state commissions have had any opportunity to review and scrutinize its new margin analysis as a whole or any of its components. Thus, for example, no party has had an opportunity to conduct discovery and cross examination relevant to AT&T's remarkable assertion that an "efficient" carrier would incur over $10 per line per month in non-network costs to provide local service. Because AT&T's analysis has not been subject to any prior scrutiny, much less the kind of scrutiny given to Qwest's cost studies, it should be given little if any weight. Any other result would lead to findings based on unreliable data, and encourage similar sandbagging in the future.

In all events, even if considered, the new margin analyses fail to demonstrate a price squeeze. First, AT&T and WorldCom have misstated the relevant revenues available to competitors in the applicable markets. The revenue data underlying AT&T's figures are not included with its filing. *See* Thompson Reply Decl. ¶ 124. 103/ It appears, moreover, that AT&T has failed to account sufficiently for the FCC's holding that price squeeze analyses must take account of access revenues. *See Vermont 271 Order* ¶ 71. Compared to WorldCom's analysis, AT&T's analysis understates access revenue by at least 30%. *See* Thompson Reply Decl. ¶ 125. But WorldCom fares no better; for example, it assumes, without any basis, that the average end user likely to be targeted by a CLEC will order only *one* vertical feature. *See id.* ¶ 124. Particularly since WorldCom's own package, "The Neighborhood" -- which is already available in Colorado, Iowa, and North Dakota, as well as 31 other states and the District of Columbia 104/ - includes *six* features, it is incumbent on WorldCom to justify its far different

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103/ Counsel for Qwest requested from AT&T a copy of these data and the other bases of AT&T's analysis, subject to the protective order in this proceeding, but AT&T refused to provide any of this material.

104/ *See* http://www.theneighborhood.com.

litigation assumption here. 105/ The result of the CLECs' unsubstantiated scattershot revenue assumptions is unsurprising: their own figures - especially for access revenues - differ substantially. *See* Thompson Reply Decl. ¶ 125.

Second, AT&T and WorldCom fail to substantiate their claims regarding the UNE rates they will pay to Qwest. They include a purported recurring OSS charge that, in reality, is a non-recurring charge that applies only *once per order*, *see* Thompson Reply Decl. ¶ 127, and various other unspecified non-recurring charges. In addition to the factual error of accounting for a nonrecurring charge as a recurring one, AT&T's inclusion of non-recurring charges is entirely disingenuous, because AT&T neglects to include corresponding opportunities for CLECs to collect non-recurring *revenues*. *See* Thompson Reply Decl. ¶ 129. 106/

Third, AT&T's and WorldCom's analyses turn on estimates of "internal costs" that have not been subject to any regulatory scrutiny, much less endorsed by any regulator, and which have been repeatedly rejected by the Commission. In its recent orders, the FCC has repeatedly rejected AT&T's and WorldCom's claims that they experience internal costs of $10.00 or more, on the basis that this figure did not represent an *efficient* carrier's costs. *See Vermont 271 Order* ¶ 70; *New Jersey 271 Order* ¶ 172; *Georgia/Louisiana 271 Order* ¶ 288. WorldCom does not even attempt to respond to these holdings, but rather relies on the *very same*

105/ Ryan Chittum, "Phone Service on the Cheap," *The Wall Street Journal*, July 2, 2002, at D1. WorldCom plans to have over two million Neighborhood subscribers by the end of 2002. *See id.* at D3.

106/ The CLECs also include "daily usage feed" (DUF) charges in their analyses. While such charges involve relatively minor amounts, they are incurred by Qwest for purposes of enabling CLECs to bill their own customers. There is no explanation by the CLECs why they are therefore not already factored into their purported customer care costs. *See* Thompson Reply Decl. ¶ 127.

affidavit the Commission has previously repudiated. *See* WorldCom Comments at 34 n.17; *Vermont 271 Order* ¶ 70.

AT&T purports to respond to the Commission's prior orders, claiming that its analysis "is based on the internal costs of an efficient entrant." AT&T Comments, Lieberman Decl. ¶ 24. Apart from the fact that these representations have not been tested, AT&T's assumes per-line internal costs are actually *higher* than those the Commission rejected in its previous orders. *See* Thompson Reply Decl. ¶ 131. AT&T's figures, moreover, are based entirely on a string of unsubstantiated "costs" and undocumented "factors" by which those costs were allegedly adjusted to simulate the expenses of an efficient carrier. *See* Thompson Reply Decl. ¶¶ 135-36. The fact that AT&T now breaks its "internal costs" into various components does not, in the absence of any supporting evidence, render them any more reliable than the unsubstantiated assertions by WorldCom that the Commission has previously rejected -- particularly since they are two and one-half times the magnitude of the costs that regulators in the applicant states estimated in computing the "avoided cost" resale discount for comparable marketing and customer care expenses faced by Qwest. *See* Thompson Reply Decl. ¶¶ 132-33, 136-38.

AT&T's contention that its purported internal costs exceed the difference between *resale* rates and available revenues is flawed for the same reasons, and is belied by the substantial evidence concerning CLEC use of resale in each of these five states. *See* Simpson Resale Decl. ¶ 5; Teitzel Track A/Public Interest Decl. ¶ 38. Moreover, the Commission rejected in its *Vermont 271 Order* the CLEC claims that the availability of resale is irrelevant to their "price squeeze" allegations:

> AT&T and WorldCom contend that it is inappropriate to consider the availability of resale as a competitive option because the

> margin is insufficient. We disagree. The distinction between how UNEs and resale are priced is significant here. UNEs are priced from the "bottom up," that is[,] beginning with a BOC's costs plus a reasonable profit, whereas resale is priced from the "top down," that is, beginning with a BOC's retail rate and deducting avoided costs. Such differing price structures are evidence that Congress envisioned competitors entering the market through different entry mechanisms under different circumstances.

Vermont 271 Order ¶ 69. Thus, Section 271 does not require that a CLEC be able to serve customers at a profit in every density zone in order for this Commission to approve a long-distance application, and certainly does not require that a CLEC earn a profit in areas where even the ILEC itself cannot do so. 107/

C. There Are No Extraordinary Circumstances Warranting Denial or Deferral of Qwest's Application

Finally, and predictably, some commenters argue that the Commission "must, under [the] public interest standard, consider a variety of other factors as evidence that the local market is not yet truly open to competition, despite checklist compliance." *New Jersey 271 Order* ¶168. The Commission has rejected such efforts to expand the requirements of the Act in the past, and it should do so again here.

For instance, a few commenters claim that there is too little residential competition in some of the application states. *See* Sprint Comments at 10; AT&T Comments at 133-137; Integra Comments at 7-8. However, as the Commission repeatedly has held, "[g]iven an affirmative showing that the competitive checklist has been satisfied, low customer volumes

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107/ Indeed, the Commission has expressly rejected the idea that resale discount rates must be set at a level that ensures the viability of a reseller's business. *See Local Competition Order* ¶ 914. Section 271, of course, links a grant of long-distance authority to the existence of forward-looking cost-based UNE rates consistent with section 252(d)(1) (checklist item 2), and resale discounts consistent with section 252(d)(3) (checklist item 14). The checklist does *not* require any particular relationship between the two. AT&T may not use the public interest inquiry to rewrite the requirements of section 271 or section 252 by impermissibly linking resale margins to its purported costs. *See Maine 271 Order* ¶ 57.

or the failure of any number of companies to enter the market in and of themselves do not undermine that showing." *Pennsylvania 271 Order*, 16 FCC Rcd at 17487 ¶ 126. The Commission likewise has concluded that it will not adopt or apply a market share or other similar test for BOC entry into long distance. 108/ The Commission has made clear that these determinations apply to the public interest analysis as well as the Track A issue. *See New Jersey 271 Order* ¶168 & n.516 (rejecting attempts to insert market share or geographic penetration requirements into the public interest analysis). This confirms what the Commission has determined is "Congress' desire to condition approval *solely* on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity to enter the market." 109/

Several commenters have alleged anticompetitive behavior by Qwest. *See, e.g.*, AT&T Comments at 119-133; Touch America Comments at 18; CompTel Comments at 7-12. But these purported anti-competitive acts amount to nothing more than a laundry list of unadjudicated and contested *assertions* from litigation filings in pending, unrelated dockets. *See, e.g.*, allegations that Qwest's arrangements with Touch America amount to the provision of in-region interLATA services (Touch America Comments at 15-16; AT&T Comments at 125-128); 110/ allegations having nothing to do with the local exchange market, such as claims

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108/ *See, e.g., New Jersey 271 Order* at 168; *Maine 271 Order* a¶ 59; *Georgia/Louisiana 271 Order* at ¶ 282; *Vermont 271 Order* at ¶ 63; *Rhode Island 271 Order* at ¶ 104; *Arkansas/Missouri 271 Order at* ¶ 126; *Pennsylvania 271 Order* at ¶ 126; *New York 271 Order*, 15 FCC Rcd at 4163 (¶ 427); *Massachusetts 271 Order*, 16 FCC Rcd at 9118-19 ¶ 235; *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6375-76 ¶ 268; *Texas 271 Order*, 15 FCC Rcd at 18558-59 ¶ 419.

109/ *New York 271 Order, ¶ 427.*

110/ Qwest is in the midst of a commercial dispute with Touch America over amounts due to Qwest in excess of $125 million. In that environment, Touch America has filed two meritless complaints against Qwest with the Commission, one alleging that the sale of IRUs in cable facilities violates Section 271, and the second claiming that other alleged grievances it has with

regarding Qwest's rates for pay telephone access lines and fraud protection (Payphone Associations Comments at 4-9); incidents occurring *outside* Colorado, Idaho, Iowa, Nebraska and North Dakota that have no connection to Qwest's operations in those states, such as a systems testing dispute between Qwest and AT&T in Minnesota (AT&T Comments at 122-123); or one-shot disputes that have long been settled or otherwise addressed, such as long-ago

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Qwest related to its purchase of Qwest's in-region long distance business in 2000 constitute violations of Section 271 and the order approving the Qwest-U S WEST merger. See File Nos. EB-02-MD-003 and –004. Touch America references those complaints here, *Touch America Comments* at 7, and other parties with no knowledge of the facts pile on. *See*, e.g., *CompTel Comments* at 11.

The disputes between Touch America and Qwest will be addressed in the pending commercial arbitration and litigation between the parties, and the FCC will dispose of the associated complaints as well in due course. For present purposes, it is enough to say that Qwest strongly objects to the Touch America allegations, which misleadingly disregard both the facts and the law. Two examples should suffice for that purpose here. Touch America complains about Qwest's sale of IRUs notwithstanding that Qwest expressly stated its intention to sell IRUs post-merger, and the Commission approved the merger with that information before it. See Qwest Divestiture Compliance Report, *Qwest Communications International Inc. and U S WEST, Inc.*, CC Docket No. 99-272, at 28-30 (filed April 14, 2000)(stating that Qwest would not unwind any pre-existing sales of in-region, interLATA IRUs "both for the conveyance of dark fiber and for the conveyance of lit fiber capacity" and that "it intend[ed] to continue selling similar telecommunications facilities in the future.") Similarly, Touch America has alleged that Qwest is not providing satisfactory OSS, referencing its complaints with various databases and software systems. *Touch America Comments* at 10; Touch America July 25, 2000 Ex Parte listing "Major Qwest Operational Support Systems"). Yet the "Qwest" systems Touch America references belong to Qwest Communication Corporation, are not used by Qwest Corporation, and are completely irrelevant to this proceeding.

The Commission has determined that complaints pending before the Commission in other dockets should not be litigated in a Section 271 docket. The Commission also has made clear that disputes arising from BOC merger orders that are currently being considered in its complaint dockets are best resolved in those other pending dockets, not imported into the consideration of section 271 applications. *Georgia/Louisiana 271 Order* ¶ 207-08 (citing *Kansas/Oklahoma 271 Order* ¶ 19); *Connecticut 271 Order* ¶ 79. Qwest will continue to defend itself against Touch America's allegations in the appropriate forums. Meanwhile, Touch America's unfounded and disingenuous allegations provide no basis for denial of this Application.

resolved allegations regarding AT&T's access to NIDs in multiple dwelling units in Washington (AT&T Comments at 131-132). 111/

While the Commission has stated that it is "interested" in evidence of BOC misconduct, *Michigan 271 Order* ¶ 397, it has made equally clear that it is not enough simply to paint a BOC as an inherently bad actor; rather, such evidence is relevant only insofar as it establishes a "pattern" that "would tend to undermine [the Commission's] confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority." 112/ For that reason, "allegations [that] do not relate to the openness of the local telecommunications markets to competition" present no reason to "deny or delay [an] application under the public interest standard." *New Jersey 271 Order* at ¶ 190. Likewise, incidents of past misconduct that have been *resolved* going forward (whether in the Section 271 process or in separate enforcement proceedings) do not call into question whether the market now "is, or will remain, open to competition." *Michigan 271 Order* ¶ 397. In addition, the Commission has repeatedly confirmed that a Section 271 proceeding is not the place to consider

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111/ It should be noted that, although AT&T attempts to resurrect a long-resolved dispute in Washington and disguise it as a public interest issue for states included in this Application, the Washington Utilities and Transportation Commission has issued orders finding that Qwest's application in Washington complies with the public interest requirements of Section 271.

112/ *Id.* Likewise, Vanion's allegations regarding termination liability assessments ("TLAs") are simply not relevant to a Section 271 application. Vanion Comments at 10-12. In fact, the Commission has specifically held that "a Section 271 application is [not the] appropriate forum to consider instituting a 'fresh look' policy (to provide an opportunity for retail and wholesale customers to exit without penalty long term contracts that the carriers have voluntarily entered into . . . ." *Texas 271 Order* ¶ 433. *See also New York 271 Order* ¶¶ 390-91; *Kansas/Oklahoma 271 Order* ¶ 281.

inter-carrier disputes that are pending (or more properly belong) in separate complaint or enforcement dockets. 113/

Nor do the "unfiled agreements" investigations pending in several states justify denying this application. *See, e.g.* AT&T Comments at 120-22; Touch America Comments at 24. Qwest, of course, has filed many interconnection agreements in the application states. Like other businesses, it also has other contacts that it is not required to file for regulatory approval. These "unfiled agreements" proceedings have arisen because some parties have argued that, under Section 252(a) of the Act, Qwest should have filed for prior state commission approval of certain of the contractual arrangements it negotiated with CLECs. 114/

Whether Qwest was obligated to file the agreements in question is solely a question of the proper interpretation of the scope of Section 252 that the Commission's orders have not yet addressed. Qwest exercised its good faith judgment in deciding how to interpret Section 252(a) in the past. Once questions were raised in this area, Qwest appropriately petitioned the Commission, as the authoritative interpreter of Section 252, for a declaratory ruling clarifying ILECs' obligations in this regard. 115/

113/ *See, e.g., Georgia/Louisiana 271 Order* ¶ 305, *Pennsylvania 271 Order* ¶¶ 108, 118; *Massachusetts 271 Order* ¶ 203; *Kansas/Oklahoma 271 Order* ¶ 230, *Texas 271 Order* ¶ 383.

114/ As noted above at Section IV.D.2, Qwest takes offense at the pejorative "secret agreements" label that some parties advocate for this matter. There is nothing sinister about respecting confidentiality in business transactions insofar as public filing is not required. The applicability of Section 252(a) to particular agreements involves a case-by-case fact determination against a currently unclear legal standard. Qwest has exercised good faith in making such judgments.

115/ *See* Petition for Declaratory Ruling of Qwest Communications International Inc., *In the Matter of Qwest Communications International, Inc., Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, WC Docket 02-89, filed Apr. 23, 2002.

There is no reason to short-circuit the "considered resolution" of these "industry-wide local competition questions of general applicability" by shoehorning them into an abbreviated Section 271 docket. 116/ As the Commission has repeatedly noted, a Section 271 docket is not the proper place to resolve "interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors - disputes that our rules have not yet addressed and that do not involve *per se* violations of self-executing requirements of the Act." *Id. See also Texas 271 Order* ¶¶ 23-27. The Department of Justice agrees that "it is not apparent that the remedy for . . . prior violations [of Section 251 or 252], if any, lies in these proceedings rather than in effective enforcement through dockets in which such matters are directly under investigation." DOJ Evaluation at 3.

State Authorities have reached exactly the same conclusion. AT&T filed motions asking that their respective Section 271 review proceedings be delayed based on the alleged unfiled agreement violations. Four of the five State Authorities here formally ruled on these requests; each rejected them. 117/ They recognized that this matter does not rise to the level

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116/ *Kansas/Oklahoma 271 Order* ¶ 19 ("The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application. . . . Such fast-track, narrowly focused adjudications are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability.").

117/ *See* Order Denying Motion, *In the Matter of the Colorado Public Utilities Commission's Recommendation to the Federal Communications Commission Regarding Qwest Corporation's Provision of In-Region, InterLATA Services in Colorado*, Colorado Public Utilities Comm'n, Docket No. 02M-260T (June 11, 2002); Order to Consider Unfiled Agreements, *In re U S WEST Communications, Inc., n/k/a Qwest Corporation*, Iowa Utilities Board, Docket Nos. INU-00-2, SPU-00-11 (June 7, 2002) ("Iowa Order to Consider Unfiled Agreements"); Notice of Commission Action, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Montana Public Service Comm'n, Docket No. D2000.5.70 (June 3, 2002); Motion to Reopen 271 Proceedings Denied, *In the Matter of Qwest Corporation, Denver, Colorado, filing its notice of intention to file Section 271(c) application with the FCC and request for Commission to verify Qwest Corporation's compliance with Section 271(c)*, Nebraska Public Service Comm'n, Application No. C-1830

where it implicates Section 271. Even the Iowa Utilities Board, which investigated these agreements in a separate docket and concluded that they should have been filed, 118/ still rejected AT&T's call to re-open Qwest's Section 271 application. The Board held that because its order in the unfiled agreements docket (Docket No. FCU-02-2) put Qwest on notice that future failures to file would result in penalties, the matter was resolved going forward, which is all that Section 271 requires. 119/

Qwest looks forward to the Commission's decision on its pending Petition. Meanwhile, however, it has taken broader action to eliminate any issue going forward. First, as detailed in the declaration of Mr. Larry Brotherson, while Qwest's petition is pending the company has voluntarily committed to file with the states all future contracts, agreements, and letters of understanding negotiated with CLECs that create obligations in connection with Sections 251(b) or (c). Brotherson Reply Decl. at ¶ 8. Qwest believes that this "all obligations" standard is overbroad, and that Section 252(a) does not require filing and prior PUC review and approval of any and all obligations agreed to between an ILEC and a CLEC. For example, regulatory approval should not be required for carrier-specific implementation details related to provisioning, Qwest-CLEC relationship management issues (such as meeting schedules and

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(June 12, 2002); Transcript of Special Meeting, *U S WEST Communications, Inc. Section 271 Compliance Investigation*, North Dakota Public Service Comm'n, Case No. PU-314-97-193 (June 13, 2002); *accord*, Order on AT&T Motion to Reopen Proceedings, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms*, Wyoming Public Service Comm'n, Docket No. 70000-TA-00-599 (June 18, 2002).

118/ *See* Order Making Tentative Findings, Giving Notice For Purpose of Civil Penalties, and Granting Opportunity to Request Hearing, *In re AT&T Corporation v. Qwest Corporation*, Iowa Utilities Board, Docket No. FCU-02-2 (May 29, 2002).

119/ *See* Iowa Order to Consider Unfiled Agreements at 9-10.

dispute resolution processes) and the like. Nevertheless, pending FCC action, Qwest will not draw lines in this area.

Second, Qwest has established a committee of senior managers (at the Executive Director level and above) to enforce compliance with this policy and any order the Commission issues on the subject. This committee meets on a regular basis (recently weekly) to review and determine whether Qwest must file particular agreements with state commissions. Brotherson Reply Decl. at ¶ 7.

Third, Qwest is adopting a new policy that will take into consideration any state orders in this area that may arise pending FCC action on its Declaratory Ruling Petition. Obviously Qwest will comply with any state commission or board order concluding that a particular agreement should have been filed under Section 252(a) insofar as that order articulates a line-drawing standard applicable to ILEC-CLEC agreements. In addition, pending FCC action on its Petition and as a further sign of good faith, Qwest will defer to potentially conflicting state commission or board decisions pursuant to the following policy. (Qwest emphasizes that this voluntary offer is made with the express understanding that it is not conceding in advance the correctness of any particular state's interpretation of Section 252(a), nor are its actions under this policy to be deemed an admission that its past decision to implement any CLEC agreement without obtaining prior PUC approval violated the Act.)

1. Qwest will take additional actions in the event of a final order concerning Section 252(a) compliance issued by a utility commission or board in a state where Qwest either has received Section 271 authority, or has an application for Section 271 authority pending before the FCC. Specifically, to the extent that (a) Qwest is required to file an agreement with a CLEC and (b) that agreement contains ongoing, currently effective obligations to the CLEC as to Section 251(b) or (c) matters, then Qwest will post the agreement on its web site as a general offering across its region.

2. Qwest will offer the same terms and conditions in its region as if the agreement had been filed in each state and the terms and conditions were available under Section 252(i). To the extent that the agreement with the CLEC includes rate-related terms in

one or more states, Qwest will make the same rates available in the respective states as if the agreement had been filed in the appropriate state, and will negotiate rates for the term and condition in states where the agreement with the specific CLEC itself does not apply.

3. When Qwest begins this process, it will send CLECs operating in its region a general advisory notice that they can look to the Qwest web site for this information now and in the future.

4. Qwest will not include within this general offer terms of agreements that (a) no longer are in effect; (b) involve payments to resolve past disputes; or (c) do not involve 251(b) or (c) interconnection matters.

5. In making this offer, Qwest in no way waives its legal position that Section 252(a) does not require the relevant agreement, or any specific provision in the agreement, to be submitted to and approved by the state regulators. By way of example, Qwest understands that publication of an agreement on its web site is not an admission that the agreement should have been filed in a state. Pending FCC action on the Declaratory Ruling Petition, Qwest's actions hereunder are not to be deemed a concession that any particular interpretation(s) of the scope of Section 252(a) ordered by a state or otherwise is a correct interpretation of the law.

6. To the extent that an agreement qualifies for web posting under this plan, Qwest will post the agreement in full. Qwest will note on the web site that "This agreement is posted for the information of other local exchange carriers. To the extent that this agreement contains ongoing obligations on the part of Qwest to [the CLEC contract party], Qwest will provide the same to other carriers upon reasonable request for the time that this agreement remains in effect and subject to the same terms and conditions, as well as applicable policies with respect to the ability of carriers to opt into agreements under Section 252(i) of the Telecommunications Act, which are incorporated herein by reference. To the extent that the agreement includes rate-related terms in one or more states, Qwest will make the same rates available in the respective states as if the agreement had been filed in the appropriate state, and will negotiate rates for the term and condition in states where the agreement with the specific CLEC itself does not apply. This offer does not apply to provisions of this agreement that have expired, that involve payments made in settlement of past disputes, or that involve matters unrelated to Section 251(b) and (c) of the Telecommunications Act."

7. Qwest will remove an agreement from its web site when it has expired, or when none of the terms remaining in effect create ongoing obligations as to matters related to Section 251(b) and (c) of the Telecommunications Act.

8. Following a final FCC order on Qwest's pending Petition for Declaratory Ruling concerning Section 252(a), Qwest will conform to the terms of that order.

Qwest has in the past been commended for its willingness to work with CLECs to meet their particular business needs. Now others are questioning its good faith judgment as to when its voluntarily negotiated agreements with CLECs must go through a prior regulatory approval process and when they need not. So be it; Qwest looks forward to further FCC clarification in this area, and will promptly accommodate clarification from the states - not just in the ordering state, but also throughout the region.

Meanwhile, however, the issue here is what, if anything, these matters have to do with the instant application. Qwest submits that the commenters' allegations with respect to Qwest's *past* filing practices under an undefined Section 252(a) filing standard have no bearing on whether the market in each of the five application states *presently* "is, or will remain, open to competition once the BOC has received interLATA authority." *Michigan 271 Order* ¶ 397. The relevant states have agreed with this conclusion. The Department of Justice concurs, noting that "such allegations of past discrimination do not appear to implicate the Department's inquiry into whether local exchange markets are fully and irreversibly open to competition." DOJ Evaluation at 3-4.

The Commission's *Georgia/Louisiana* decision is directly on point. In that proceeding, two CLECs claimed that a BellSouth interconnection policy violated the CLECs' "rights to interconnect 'at any technically feasible point' within BellSouth's network," and that, as a result, the BOC had not satisfied its obligations under checklist items 1 and 9. The Commission rejected the CLECs' argument because (1) the BellSouth policy at issue had been rescinded, (2) a Section 271 docket was not the place "to settle new and unresolved disputes about the precise content of an incumbent LEC's obligations to its competitors," and (3) the issue concerned matters "open . . . before [the] Commission" in another docket. *Georgia/Louisiana*

271 Order ¶ 207-08 (citing *Kansas/Oklahoma 271 Order* ¶ 19). All of these considerations apply here.

Furthermore, the Qwest performance assurance plans provide an independent basis for the Commission to find that Qwest will take the actions necessary to keep its markets open for all CLECs. They stand as a remedy for any future Qwest failure to meet its obligations under Section 271. The Commission has held that even in cases of past misconduct, the adoption of a performance assurance plan or other performance-related commitments "could alleviate substantially these concerns" going forward. *Michigan 271 Order* ¶ 399. Qwest denies any such misconduct here, and submits that - in any event - grant of this Application should not be denied based on pending arguments over the correctness of its past decisions (in an undefined legal zone) that certain contract arrangements with CLECs do not require prior regulatory filing and approval.

In short, the Commission should find here, as the states and Justice Department have already, that the "unfiled agreements" matter does not present any basis for rejecting this Application. 120/ And the Commission similarly should reject all of the other red herrings that

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120/ The commenters' remaining claims are without merit. AT&T's overheated suggestion that CLECs' individual business decisions to settle their disputes with Qwest outside of a Section 271 docket raises "grave concern about the fundamental integrity" of the state record (AT&T Comments at 122) ignores just how exhaustive the state proceedings were (as well as AT&T's own zeal in raising the issues of nonparticipating carriers). As the CPUC notes, "[i]n a 'but-for' world, the potential impact of CLEC *non*participation in the collaborative process is, at worst, close to nil." CPUC Evaluation at 64. Similarly, AT&T's attempt to manufacture some difference between the question of the Section 252 filing obligation and any duty of nondiscrimination (AT&T Comments at 17, 121) is unavailing. The point and effect of filing an agreement is to make its terms available to other CLECs under 47 U.S.C. § 252(i), the "pick and choose" provision. If Qwest has no obligation to file an agreement, that means it has no obligation to make its terms available to other carriers under Section 252(i), and any failure to offer these terms to other carriers is not unlawfully discriminatory. Conversely, Qwest's commitment to apply a broader filing standard going forward until the Commission clarifies the

commenters have tried to raise under the rubric of "public interest" analysis. The commenters have not rebutted Qwest's comprehensive showing that the local markets in these five states are open to competition. Now consumers should enjoy the corresponding public benefits of more choices in the long distance market.

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precise scope of the filing obligation means all relevant terms are available to all CLECs *via* Section 252(i) going forward, and hence no putative discrimination problem is left.

CONCLUSION

The local exchange market in each of the application states is demonstrably open to competition. Qwest has satisfied its statutory checklist obligations and otherwise complied with the requirements of the 1996 Act, and it will continue to do so in the future. Its entry into the interLATA market in each of Colorado, Idaho, Iowa, Nebraska and North Dakota will fulfill the promise of competition for all the residents of these states.

Accordingly, for all the reasons stated herein and in its opening brief, Qwest's Consolidated Application should be granted.

Respectfully submitted,

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July 29, 2002

I hereby certify that a copy of the Reply Comments of Qwest Communications International Inc. in Support of Consolidated Application for Authority To Provide In-Region, Interlata Services In Colorado, Idaho, Iowa, Nebraska and North Dakota was served via Express Mail on this 29th day of July, 2002 to the following:

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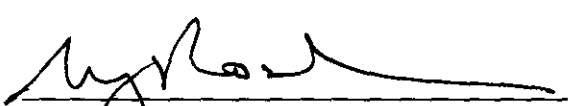

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DOCKET NO. 02-148 Attachment A

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